80-824

No.....

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1980

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Petitioners,

VS.

RUSSELL RICHARD DODSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eighth Circuit erred in holding that a county employed public defender acts under color of state law in representing indigent defendants, and is subject to suit under 42 U.S.C. §1983.

2. Whether the Court of Appeals for the Eighth Circuit erred in holding that in suits brought under 42 U.S.C. §1983, a county employed public defender enjoys only a qualified immunity for actions taken while representing indigent clients.

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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Petitioners,

vs.

RUSSELL RICHARD DODSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The above-named Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit, entered in this case on August 26, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, not yet reported, was filed on August 26, 1980, and is reproduced in Appendix "A" hereof. The opinion of the United States District Court for the Southern District of Iowa was filed on November 5, 1979, is reported at 483 F. Supp. 347, and is reproduced in Appendix "B" hereof.

JURISDICTION

The Judgment and Opinion of the panel of the Court of Appeals for the Eighth Circuit was entered on August 26, 1980,[1] and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1343(3).

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[1] Judge Overton of the United States District Court for the Eastern District of Arkansas, sitting by designation, dissented from the Court's Opinion.

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eighth Circuit erred in holding that a county employed public defender acts under color of state law in representing indigent defendants, and thus is subject to suit under 42 U.S.C. §1983.

2. Whether the Court of Appeals for the Eighth Circuit erred in holding that in suits brought under 42 U.S.C. §1983, a county employed public defender enjoys only a qualified immunity for actions taken while representing indigent clients.

STATUTE INVOLVED

42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This case presents two related questions of fundamental and recurring importance concerning the liability of government employed public defenders under 42 U.S.C. §1983: First, whether a public defender, in representing indigent defendants, acts under color of state law; and second, whether the public defender enjoys immunity, either qualified or absolute, for conduct during that representation.

This action began when the Respondent filed a pro se complaint in the United States District Court for the Southern District of Iowa alleging that Martha Shepard, an attorney in the Polk County Offender Advocate's Office, failed to adequately represent him in his appeal to the Iowa Supreme Court of a robbery conviction. The Respondent contended that Mrs. Shepard had been appointed to represent him on his appeal of his conviction,

but had moved for permission to withdraw as counsel and had the appeal dismissed as frivolous. Iowa Rule of Appellate Procedure 104 provides for dismissal of appeals found by the Iowa Supreme Court to be "wholly frivolous". The Motion to Withdraw was granted by the Iowa Supreme Court and the appeal was dismissed.

The Respondent then instigated the present lawsuit in the United States District Court for the Southern District of Iowa, claiming that Mrs. Shepard's actions deprived him of his right to counsel, inflicted on him cruel and unusual punishment, and arbitrarily denied him his state-created right to appeal in violation of the Due Process Clause. The action was brought under 42 U.S.C. §1983, and jurisdiction was invoked pursuant to 28 U.S.C. §1343(3). The complaint also named the Polk County Offender Advocate and the Polk County Board of Supervisors as Defendants, alleging that they

were responsible for Mrs. Shepard's actions because they had established rules and procedures for her to follow. The complaint sought both injunctive relief and monetary damages.

The District Court[2] dismissed the claims against Mrs. Shepard and the Offender Advocate for lack of state action. The claims against the Polk County Board of Supervisors were also dismissed because, in the District Court's opinion, the complaint failed to allege the requisite personal involvement with unconstitutional conduct. The Respondent then filed a Motion to Reconsider, or in the alternative, a Motion for Leave to Take an Interlocutory Appeal. The Court overruled the Motion to Reconsider, and ordered that the Respondent could proceed in forma pauperis to appeal the Court's order of dismissal.

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[2] The United States District Court for the Southern District of Iowa, the Honorable Harold D. Vietor presiding.

On appeal to the United States Court of Appeals for the Eighth Circuit, Mr. John D. Hudson was appointed to represent the Respondent to address the sole issue of whether or not a public defender is subject to suit under 42 U.S.C. §1983. Briefs were filed, oral argument was presented, and on August 26, 1980, the Eighth Circuit, after recognizing the considerable split in authority among the Federal Courts entertaining this issue, reversed the decision of the District Court and held that a county employed public defender does act under color of state law in representing indigent defendants and enjoys only a qualified immunity from liability.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION OF WHETHER OR NOT A COUNTY EMPLOYED PUBLIC DEFENDER REPRESENTING AN INDIGENT DEFENDANT OPERATES UNDER COLOR OF STATE LAW FOR THE PURPOSES OF 42 U.S.C. §1983 IS A QUESTION WHICH

HAS CREATED A CONSIDERABLE SPLIT IN AUTHORITY AMONG FEDERAL COURTS ENTERTAINING THE ISSUE, AND RAISES SIGNIFICANT AND RECURRING PROBLEMS UNDER THE ACT.

Relief under 42 U.S.C. §1983 is available only if the party alleged to be liable operated "under color of state law". This requirement appears to be an essential jurisdictional ingredient of a §1983 action. At the present time, five other United States Courts of Appeal have been faced with the question of whether or not a public defender representing an indigent defendant acts under color of state law so as to be in the purview of 42 U.S.C. §1983. The Seventh Circuit has issued a decision consistent with the Eighth Circuit's ruling in t is case. Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978). However, the Third, Fifth, Ninth and Tenth Circuits have rendered decisions which are diametrically

opposed to the view expressed by the Eighth Circuit and the Seventh Circuit. Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972) (dictum); Skipper v. Brummer, 598 F.2d 427 (5th Cir. 1979); Miller v. Barilla, 549 F.2d 648, 650 (9th Cir. 1977) (dictum); and Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972). Those four Circuit Courts of Appeal all ruled that a public defender's actions were not performed under color of state law so as to render the defender liable in a §1983 action.

In Espinoza, supra, the Tenth Ciruit reasoned as follows:

> "It is well settled that in order for a defendant to be liable under the Civil Rights Act he must have acted under color of state law to cause the denial of a federally protected right . . . The Colorado office of public defender derives its existence from Colorado statutes . . . These statutes in no way attempt to control or otherwise influence the professional judgment of a lawyer employed as a public defender. Additionally,

> a Colorado public defender's responsibilities toward his clients are identical in all respects to any other Colorado attorney whether privately obtained or court appointed."
>
> "Therefore, we hold that an attorney does not act under color of state law simply because he has accepted employment as a Colorado public defender."

The Espinoza Court was pursuaded by the analysis of the District Courts in United States ex rel. Wood v. Blacker, 335 F. Supp. 43 (D.C. N.J. 1971), and Peake v. County of Philadelphia, Pennsylvania, 280 F. Supp. 853 (E.D. Pa. 1968).

In contrast with the Tenth Circuit's reasoning in Espinoza, and the Third Circuit's opinion in Brown, the lower court's decision rested upon the fact that all of the public defenders of Polk County are hired and payed by the County and are not selected by their clients. In finding color of state law on the part of Polk County's public defenders, the Eighth Circuit stated:

> "In our view, however, the dispositive point is that the Offender Advocate and all his subordinates are employees of the County, which in turn, of course, is merely a creature of the State of Iowa. All these lawyers are selected, paid, hired, and fired by the County. Whether individual decisions made by attorneys in the office of the Offender Advocate are governed or influenced by the County or its officials is therefore beside the point . . ."

This confused and conflicting state of the law in the various Circuit Courts of Appeal presents significant problems for the state and municipal governmental bodies who provide funding for these public defender offices. Currently, with the relevant jurisdictional question essentially undecided, state and local officials are unable to determine whether or not they need to purchase insurance policies which will provide liability coverage for potential §1983 claims that may be filed against their public defenders. In addition, these same officials need to know whether the defense

of §1983 suits is going to place a drain upon that legal services resource known as the public defender; very simply, if the public defender is going to be required to answer in court every time a §1983 action is filed against him, his attention and energy will be diverted and will result in governing bodies being compelled to hire additional public defenders to so compensate. Finally, local judges are interested in this issue, since the current status of the law causes them confusion in deciding whether to appoint as counsel for indigents private attorneys, who are not liable under §1983, or public defenders, who may be subject to suit under the statute.

The divergent conclusions which have been reached in the Circuit Courts of Appeal on this issue, and the resulting problems to state and local officials, are perhaps the best evidence that this issue is one which must be resolved by the United States Supreme Court. The Supreme Court's guidance

is greatly needed to answer the significant question of whether or not a public defender representing an indigent defendant operates under color of state law, a jurisdictional requirement for an action under 42 U.S.C. §1983. Governments may well consider the final answer to this question in determing the manner in which to fulfill their duty to provide indigents with criminal defense counsel.

II. THE QUESTION OF WHETHER OR NOT A COUNTY EMPLOYED PUBLIC DEFENDER REPRESENTING AN INDIGENT DEFENDANT ENJOYS A DEGREE OF IMMUNITY FROM LIABILITY UNDER 42 U.S.C. §1983 HAS CREATED A SPLIT IN AUTHORITY AMONG THE CIRCUIT COURTS OF APPEAL WHICH HAVE DECIDED THE QUESTION, AND RAISES IMPORTANT AND RECURRING PROBLEMS UNDER THE STATUTE.

A secondary question which the Circuit Courts of Appeal have been faced with in deciding §1983 claims against public defenders

is the degree of immunity, if any, that public defenders enjoy from actions brought under 42 U.S.C. §1983. This issue becomes of paramount importance if a court concludes that a public defender does act under color of state law for the purposes of §1983, because a grant of immunity may absolve the defender from potential liability. Every Court of Appeals that has decided the issue has held that public defenders enjoy some form of immunity from suits brought under 42 U.S.C. §1983.

The Third, Fourth, Seventh and Ninth Circuits hold that a public defender should be accorded absolute immunity from actions under 42 U.S.C. §1983 for acts performed as legal counsel to indigent defendants. Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972); Minns v. Paul, 542 F.2d 899 (4th Cir. 1976); Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978); and Miller v. Barilla, 549 F.2d

648 (9th Cir. 1977). However, with its ruling below granting public defenders only a qualified immunity from §1983 liability, the Eighth Circuit's decision is significantly in opposition to the views expressed by the other Circuits.

In Minns, supra, the Fourth Circuit, in granting absolute immunity to a public defender sued under §1983, reasoned as follows:

> "We perceive no valid reason to extend this immunity to state and federal prosecutors and judges and to withhold it from state appointed and state subsidized defenders . . ."
>
> "The decisions of the Third Circuit in Brown and that of the Seventh Circuit in John correctly identify the policy reasons which support the rule of absolute immunity. Basically, there are two: (a) The need to recuirt and hold able lawyers to represent indigents - both full time and part time public defenders, as well as private practitioners appointed by courts to represent individual defendants or litigants, and (b) the need to encourage counsel in the full exercise of professionalism, i.e., the unfettered discretion, in the light of their training and

> experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced."

The Minns Court went on to recognize that unless absolute immunity was granted, public defenders would not be totally free to exercise their best judgment in representing clients since every decision would be weighed in terms of potential liability. Further, the Fourth Circuit was pursuaded by the analysis of the Third Circuit in Brown when it noted that a rule of absolute immunity for public defenders would not leave the typical indigent defendant entirely remediless. The Court stated that if the misconduct of the defender results in the deprivation of a federal right in the defense of a prosecution, redress of such deprivation may be achieved through a direct appeal, a state post-conviction remedy, or by federal habeas corpus proceedings.

In contrast with the Fourth Circuit's reasoning in Minns, and with the various decisions of the Third, Seventh and Ninth Circuit Courts of Appeal, the Eighth Circuit's ruling below granted public defenders only a qualified immunity from §1983 claims for actions taken while representing indigent clients. After citing Ferri v. Ackerman, ____U.S.____, 48 U.S.L.W. 4054 (1979), which held that in the context of a malpractice action arising under state law, an attorney appointed by a federal court to represent an indigent defendant is not entitled to absolute immunity as a matter of federal law, the Eighth Circuit concluded:

> "Although Ferri was not a civil rights action, its rationale is controlling here by analogy. We perceive no distinction of substance, for immunity purposes, between appointed counsel and a public defender. If federal law does not immunize counsel appointed by a federal court from a state law tort action, neither does it immunize a public defender from liability under 42 U.S.C. §1983 for a constitutional tort. . . ."

"On the other hand, we do not read Ferri to prohibit the implication of some degree of immunity in §1983 cases . . ."

". . . Lawyers representing indigent clients should feel free to exercise in good faith their professional judgment to decline to press the frivolous claim and to make decisions regarding strategy and tactics . . . In addition, the law should not make it too difficult to recruit and hold vigorous and competent attorneys to represent indigent defendants. The grant of a qualified immunity is an appropriate compromise between these interests on the one hand, and the fundamental public interest in providing relief to indigent clients under §1983 whose constitutional rights are violated. We hold, therefore, that in §1983 suits attorneys employed by public defender offices enjoy the qualified immunity we have described for actions taken while representing indigent clients."

The obvious conflicts in the decisions of the Circuit Courts of Appeal indicate that this issue should be resolved by the United States Supreme Court. A binding ruling by the Supreme Court is required not only to protect the interests of county employed public defenders, but also to define

and illuminate the constitutional remedies available to indigent defendants under 42 U.S.C. §1983.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment and Opinion of the Eighth Circuit Court of Appeals in this matter.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
St. Louis, Missouri
Heard June 9, 1980
Filed August 26, 1980
Before

Hon. GERALD W. HEANEY, Circuit Judge
Hon. RICHARD S. ARNOLD, Circuit Judge
Hon. WILLIAM A. OVERTON, District Judge*

NO._____

RUSSELL RICHARD DODSON,

Appellant,

v.

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE: and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Appellees.

Appeal from the United States District Court for the Southern District of Iowa, Central Division, Des Moines, Iowa
Civil No. 79-507-B
Harold D. Vietor, Judge

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*The Honorable William A. Overton, United States District Court Judge for the Eastern District of Arkansas, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1996

Russell Richard Dodson,	*	
Appellant,	*	
v.	*	Appeal from the United States
Polk County; Polk County Board of Supervisors; Polk County Offender Advocate; and Martha Shepard, Individually and through her official capacity as an Agent or Assistant for Polk County,	*	District Court for the Southern District of Iowa
Appellees.	*	

Submitted: June 9, 1980

Filed: August 26, 1980

Before HEANEY and ARNOLD, Circuit Judges, and OVERTON*, District Judge

ARNOLD, Circuit Judge.

This appeal presents two related questions concerning the liability under

*The Hon. William R. Overton, United States District Judge for the Eastern District of Arkansas, sitting by designation.

42 U.S.C. §1983 of a county-employed public defender: First, whether a public defender, in representing an indigent defendant, acts under color of state law; and second, whether the defender enjoys immunity, either qualified or absolute, for conduct during that representation. The complaint alleged that Martha Shepard, an attorney in the Polk County, Iowa, Offender Advocate's office, failed to represent appellant adequately in his appeal of a robbery conviction to the Supreme Court of Iowa. Finding no state action, the United States District Court for the Southern District of Iowa dismissed the complaint as frivolous. We hold that a county-employed public defender does act under color of state law in representing indigent defendants and enjoys a qualified immunity from liability.

I.

We take the allegations of the complaint as true on this appeal. It alleged that Dodson had been convicted of robbery in an Iowa state court, and that Ms. Shepard was appointed to represent him on appeal. Subsequently, she moved for permission to withdraw as counsel and to have the appeal dismissed as frivolous. Iowa R. App. P. 104 provides for dismissal of appeals found by the Supreme Court of Iowa to be "wholly frivolous." The motion was ultimately granted, and the appeal was dismissed. Dodson alleged in this case that Ms. Shepard's actions deprived him of his right to counsel, inflicted on him cruel and unusual punishment, and arbitrarily denied him his state-created right to appeal in violation of the Due Process Clause of the Fourteenth Amendment. The

complaint set out pendent claims for malpractice and breach of an oral contract to prosecute the appeal.

The Polk County Offender Advocate and the Polk County Board of Supervisors, also named as defendants, were alleged to be responsible for Ms. Shepard's actions because they established rules and procedures for her to follow in handling criminal appeals. The District Court dismissed the claims against Ms. Shepard and the Offender Advocate, a county public official who supervises public defenders, for lack of state action. The claims against Polk County and its Board of Supervisors were dismissed because, in the opinion of the District Court, the complaint failed to allege the requisite personal involvement with unconstitutional conduct. Having disposed of all the constitutional claims, the District Court dismissed the pendent state claims as well.

The District Court, in a thoughtful opinion canvassing the existing authorities on the point, relied principally on the fact that a public defender, like private counsel, owes a duty of undivided loyalty to her client, and makes, or should make, decisions solely in the interest of the client. It may be true, and we assume for present purposes, that Polk County has no authority to direct or influence particular decisions that its public defenders make in the course of their representation of indigent defendants. It is also true, we assume, that the responsibility of a public defender, in terms of rules of ethics and standards of professional conduct, is the same in all respects as that of any other Iowa attorney, whether privately employed or court-appointed. In our view, however, the dispositive point is that the Offender Advocate and all his subordinates are

employees of the County, which in turn, of course, is merely a creature of the State of Iowa. All these lawyers are selected, paid, hired, and fired by the County. Whether individual decisions made by attorneys in the office of the Offender Advocate are governed or influenced by the County or its officials is therefore beside the point. Public defenders receive their power not because they are selected by their clients, but because they are employed by the County to represent a certain class of clients, who likely have little or no choice in selecting the lawyer who will defend them. In short, we are persuaded by the analysis, on this point, of Robinson v. Bergstrom, 579 F.2d 401, 404-08 (7th Cir. 1978) (per curiam). See also the useful discussion in Note, Liability of Public Defenders Under Section 1983, 92 HARV. L. REV. 943 (1979). We hold that an attorney

in a county or state funded public defender's office acts under color of state law in representing indigent defendants. We are mindful that other courts have reached the opposite conclusion,[1] but for the reasons we have stated we simply disagree.[2]

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[1] E.g., Skipper v. Brummer, 598 F.2d 427 (5th Cir. 1979) (per curiam); Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972) (per curiam); United States ex rel. Wood v. Blacker, 335 F. Supp. 43, 47 (D.N.J. 1971); Peake v. County of Philadelphia, 280 F. Supp. 853 (E.D. Pa. 1968); Miller v. Barilla, 549 F.2d 648, 650 (9th Cir. 1977) (dictum); Brown v. Joseph, 463 F.2d 1046, 1047-48 (3d Cir. 1972) (dictum), cert. denied, 412 U.S. 950 (1973).

[2] Cf. Robinson v. Jordan, 494 F.2d 793, 795 (5th Cir. 1974) (per curiam) (county health officer acted under color of state law where prisoner had no choice of doctor). We do not question the often-stated rule that a private attorney appointed by a state court to represent an indigent defendant does not act under color of state law. E.g., Harkins v. Eldredge, 505 F.2d 802 (8th Cir. 1974) (per curiam).

II.

We next consider whether a public defender enjoys a degree of immunity from §1983 liability for actions taken while representing clients.[3] At the outset, we note that §1983 itself specifies no immunities; it imposes liability by its terms upon "every person," and reflects a determination by Congress that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." Owen v. City of Independence, ____U.S.____, 48 U.S.L. WEEK 4389, 4397 (1980). It should be "construed generously to further its primary purpose." Gomez v. Toledo, ___U.S. ____, 48 U.S.L. WEEK 4600, 4601 (1980).

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[3] The District Court did not reach this issue, but it has been briefed in this Court and is purely a question of law. It is therefore appropriate for us to decide it now.

On the other hand, the Supreme Court has on occasion found that immunity was so deeply rooted in both the common law and public policy that it was not abrogated by §1983's silence on the question. Thus, Pierson v. Ray, 386 U.S. 547, 553-54 (1967), held that the absolute immunity afforded judges at common law was preserved under §1983, and absolute immunity was extended to prosecutors for the same reasons in Imbler v. Pachtman, 424 U.S. 409 (1976). Relying upon cases such as Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977), and Robinson v. Bergstrom, 579 F.2d 401, 408-11 (7th Cir. 1978) (per curiam), appellees argue that we should extend absolute immunity to public defenders.

To do so, however, we would have to ignore Ferri v. Ackerman, ____U.S.____, 48 U.S.L. WEEK 4054 (1979), which held in the context of a malpractice action arising

under state law, that an attorney appointed by a federal court to represent an indigent defendant is not entitled to absolute immunity as a matter of federal law. In the course of its unanimous opinion, the Court distinguished the function of a prosecutor or judge from that of appointed counsel. A judge or prosecutor, the Court noted, represents the interest of society as a whole, and absolute immunity gives them "the maximum ability to deal fearlessly and impartially with the public at large." Id. at 4057. On the other hand, the duty of appointed counsel is not to the public at large except in a very general way, but is to serve the undivided interest of his client, just as privately retained counsel do. Thus, the Court concluded "that the essential office of appointed defense counsel is akin to that of private counsel and unlike that of a prosecutor . . . or judge

. . .," ibid., and this was the Court's primary rationale.

Although Ferri was not a civil rights action, its rationale is controlling here by analogy.[4] We perceive no distinction of substance, for immunity purposes, between appointed counsel and a public defender. Both owe primary allegiance to the client and represent the public interest only in a general way. If federal law does not immunize counsel appointed by a federal court from a state-law tort action, neither does it immunize a public defender from liability under 42 U.S.C. §1983 for a constitutional tort.

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[4] In White v. Bloom, Nos. 79-1853, 79-1893, slip op. at 8 (8th Cir., April 30, 1980), we applied the logic and holding of Ferri in a §1983 suit by an indigent defendant against his state-court-appointed lawyer. The state-action requirement, we said, would be satisfied by a sufficient allegation that appointed counsel conspired with state officials.

The fear that a disgruntled client will file suit under 42 U.S.C. §1983 does not conflict with the performance of a lawyer's duty, and may in fact provide incentive to perform competently. Counsel is presumably subject to a malpractice action under state law, anyway. For these reasons, we are compelled to deny the invitation to extend absolute immunity to public defenders.

On the other hand, we do not read Ferri to prohibit the implication of some degree of immunity in §1983 cases. In limited instances, the Supreme Court has held that public officials are entitled to a qualified immunity from damages under §1983. E.g., Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials); O'Connor v. Donaldson, 422 U.S. 563 (1975) (state hospital superintendent); Wood v. Strickland, 420 U.S. 308 (1975) (school

board member). A finding of qualified immunity is usually preceded by an inquiry into whether the public official in question enjoyed immunity at common law. There is, of course, no pre-§1983 common law with regard to the liability of public defenders. The dispositive question, then, is whether some degree of immunity is justified as a matter of public policy.

We believe that it is. Public defenders need the assurance that "action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." Wood v. Strickland, 420 U.S. 308, 321 (1975). The defender oversteps the immunity boundary, however, if he acts in a manner which he knows or reasonably should know will violate the constitutional rights of his client, or if he acts with

the malicious intention to injure his client. The touchstone is good faith. Id. at 322.

This degree of immunity from damage liability is justified for several reasons. It would be incongruous to grant such immunity to other public servants--such as police officers, school board members, prison officials, and state hospital superintendents -- who regularly exercise their discretion in ways that touch upon constitutional rights, and to deny this protection to public defenders. Lawyers representing indigent clients should feel free to exercise in good faith their professional judgment to decline to press the frivolous claim and to make decisions regarding strategy and tactics. These are the reasons for which they are employed. If they are not afforded some protection, they may act with trepidation, and indigent defendants will be the ones who ultimately lose in the

proc s. In addition, the law should not make it too difficult to recruit and hold vigorous and competent attorneys to represent indigent defendants. The grant of a qualified immunity is an appropriate compromise between these interests on the one hand, and the fundamental public interest in providing relief to indigent clients under §1983 whose constitutional rights are violated. We hold, therefore, that in §1983 suits attorneys employed by public defender offices enjoy the qualified immunity we have described for actions taken while representing indigent clients.

III.

We will comment briefly about the potential liability of Polk County, the Polk County Board of Supervisors, and the Polk County Offender Advocate. The District Court dismissed the claim against the

Offender Advocate for lack of state action, and we have found dismissal on this ground to be error. Whether the requisite personal involvement by the Offender Advocate in the claimed unconstitutional conduct was sufficiently alleged, however, is a separate issue which the District Court did not reach. Reading the allegations of the pro se complaint expansively, as we must, to determine whether relief might be justified on any possible theory, Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam), we find that the complaint alleges that the Offender Advocate was responsible for Ms. Shepard's actions because he established rules and procedures for her to follow in handling criminal appeals. These allegations are sufficient, as a matter of pleading, to state a §1983 claim against the Offender Advocate. Cf. Monell v. New York City Dept. of Social Services, 436

U.S. 658, 690-95 (1978). Similar allegations were made as to the involvement of the Polk County Board of Supervisors, and we hold that the complaint is sufficient to state a claim against the Board members for the same reason.[5] These individuals, of course, will enjoy the same degree of immunity as the Offender Advocate and Ms. Shepard. Wood v. Strickland, 420 U.S. 308 (1975). In addition, it may become clear, through discovery or otherwise, that the rules and procedures referred to in the complaint had nothing to do with Ms. Shepard's actions in Dodson's case. In that event, it may be appropriate to renew the no-personal-involvement defense by motion for summary judgment.

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[5] There can be no question that the members of the Polk County Board of Supervisors, in carrying out the responsibilities of that office, act under color of state law.

The final question is whether the complaint, liberally construed, states a cognizable claim against Polk County as an entity. Even though we interpret the allegations expansively, we are unable to say that the complaint alleges the necessary county involvement in the claimed unconstitutional conduct by virtue of the execution of county policy or custom.[6] Monell v. New York City Dept. of Social Services, supra, at 694. The appellant did not have counsel in the District Court,[7] and was given no opportunity to meet any objections

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[6] The portion of the complaint which names Polk County reads as follows: "Polk County is enjoined [sic - perhaps "joined" is meant] in this action because it is the political basis, and the source that authorized it's [sic] political subdivisions and it's [sic] quasi-contractants to act in the manner prescribed in this complaint . . ."

[7] On remand, the District Court may wish to allow appointed appellate counsel to continue representing Dodson. The presence of counsel often makes it easier for district courts to manage and decide this kind of case expeditiously and fairly.

to the sufficiency of the complaint which might have been raised. On remand, the appellant should be given the opportunity to amend to state his claim against the County with more specificity. We intimate no opinion whether the County is entitled to any immunity.[8]

IV.

The District Court was correct in dismissing the claim for an injunction commanding Dodson's release. This claim is in the nature of habeas corpus, and it is conceded that state remedies have not been exhausted. On this question, we affirm.

V.

The judgment (except as noted in Part IV of this opinion) is reversed, and this

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[8] Owen v. City of Independence, supra, held that municipalities have no qualified immunity under §1983 for their good-faith constitutional violations.

case is remanded for further proceedings consistent with this opinion. On remand, the District Court should reinstate the pendent state-law claims, subject, of course, to appropriate action if the federal claims should later be dismissed for any reason.

Affirmed in part, reversed in part, and remanded.

OVERTON, District Judge, dissenting.

I disagree with the conclusion that a public defender representing an indigent defendant operates under color of state law, a jurisdictional requirement for an action under 42 U.S.C. §1983.

The still valid test for determining whether a person is acting under color of state law is the language in United States v. Classic, 313 U.S. 299 (1940) at Page 326: "Misuse of power, possessed by virtue of state law and made possible only because

the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." (emphasis added). See also, Monroe v. Pape, 365 U.S. 167, 18387 (1961); Williams v. United States, 341 U.S. 97, 99 (1951); and Screws v. United States, 325 U.S. 91, 108-113 (1945).

The alleged wrongs of defendant, Shepard, were not "made possible only because" she was a public defender. She could have rendered the same alleged ineffective assistance of counsel as a retained attorney or as an appointed counsel. All but one circuit considering the question have reached the conclusion that such a wrong is not under color of state law. Skipper v. Brummer, 598 F.2d 427 (5th Cir. 1979) (per curiam); Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972) (per curiam); Miller v. Barilla, 549 F.2d 648, 650 (9th Cir. 1977) (dictum); and

Brown v. Joseph, 463 F.2d 1046, 1047-48 (3rd Cir. 1972) (dictum), cert. denied, 412 U.S. 950 (1973).[1] The Seventh Circuit, in Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978) (per curiam) stands alone with its decision to the contrary. Moreover, it seems fairly significant that the Robinson court, while stating that a public defender acts under color of state law, also held that the defender enjoys absolute immunity from suit rather than the qualified immunity which the majority confers in this instant case. Id. at 410-411.

The majority, in concluding that a public defender's relationship to the client is different from any other attorney,

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[1] Additionally, these published District Court decisions support the conclusion that public defenders do not act under color of state law: United States ex rel. Wood v. Blocker, 335 F. Supp. 43, 47 (D.N.J. 1971) and Peake v. County of Philadelphia, 280 F. Supp. 853 (E.D. Pa. 1968).

relies upon (1) the fact that the public defender is hired, paid and subject to fire by the county, and (2) the fact that the indigent defendant has no choice in selecting his lawyer. By the same token, a court appointed attorney is (1) usually selected and paid by the state and (2) is not usually the product of the indigent's selection. Yet, this circuit has consistently held that neither retained nor appointed attorneys are liable under 42 U.S.C. §1983 for deprivation of constitutional rights, because they do not act under color of state law. Harkins v. Eldredge, 505 F.2d 802, 803 (8th Cir. 1974); Barnes v. Dorsey, 480 F.2d 1057 (8th Cir. 1973); Harley v. Oliver, 539 F.2d 1143, 1145-46 (8th Cir. 1976). See also, White v. Bloom, No. 79-1858 (8th Cir. Slip Op. Apr. 30, 1980).

The reasoning for a conclusion that public defenders do not act under color of state law is best stated in Ferri v. Ackerman, 444 U.S. 193 (1979). Although the issue in Ferri was the question of immunity for an attorney appointed by a Federal Court and paid for his services with federal funds, the decision addressed the argument that court appointment and payment with public funds changed the traditional attorney-client relationship. The Court answered the question by stating:

> ". . . the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serve pursuant to statutory authorization and in furtherance of the federal interest in incurring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the individual interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently

of the government and to oppose it in adversary litigation." 48 U.S. Law Week at Page 4057.

In my view, there is simply no sound basis for distinguishing the public defender's role as attorney for his client from that of any other attorney because of the source of his remuneration. Indeed, the positions taken by the public defender are always adverse to those of the state. It is difficult for me to conclude that the public defender is acting under color of state law while entering "not guilty" pleas, moving to suppress state's evidence, objecting to evidence at trial, cross-examining state's witnesses and making closing arguments in behalf of defendants.

While I would decide the claim against Ms. Shepard on the initial jurisdictional point that the public defender does not act under color of state law and thus not reach the merits of the immunity question, I am constrained to state my further dis-

agreement with the majority on the matter of immunity from suit. Like the Seventh Circuit panel in Robsinson v. Bergstrom, supra, I would hold that the public defender enjoys the same absolute immunity from suit as that of the prosecutor announced in Imbler v. Pachtman, 424 U.S. 409 (1975).

My concern is that the present scheme of the law leaves the disgruntled 1983 claimant with one clear target for his anger and frustration with the criminal justice system. The judge and prosecutor are clearly immune from suit and the court appointed counsel is "not acting under color of state law," Ferri v. Ackerman, 444 U.S. 193. But the majority here has held that the claimant may vent his frustration by suing the public servant who defended him. It seems clear that policy reasons should counsel heavily against subjècting the

public defender to such liability. Such officers are notoriously overworked and underpaid. Placing on them the burden of defending suits which are often without merit[2] can only make the job of finding competent, permanent staff for public defender offices more difficult. As Judge Anderson stated for the Ninth Circuit in Miller v. Barilla, supra, (holding the public defender absolutely immune under §1983),

> "Any qualified immunity doctrine would force defense of suits well through the pleading stages, and place a substantial drain on an already burdened legal services resource. Additionally, each public defender 'would be constrained to weigh every decision in terms of potential liability,'"

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[2]The Reports of the Judicial Conference—Report of the Administrative Office, U.S. Courts, 1979, at 221-222, states that filings by state prisoners in civil rights cases increased to 11,195 in 1979, a 15.1% increase over 1978, and a 451.5% increase over 1970. The report of the Federal Judicial Center, 1980 Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts, at page 9, indicates that 96.5% of the §1983 cases terminated in federal courts in 1979 were dismissed or otherwise concluded prior to trial.

quoting Minns v. Paul, 542 F.2d 899 (4th Cir. 1976).

It should be noted that the Ninth Circuit in Miller, while holding the public defender absolutely immune under §1983, did not reach the question whether the officer acts under color of state law. This may, of course, be criticized as a decision of the merits without first resolving a jurisdictional controversy. But it further illustrates the currently confused and conflicting state of the law in the various circuits. The Seventh and Eighth Circuits hold a public defender acts under color of state law, but the Seventh Circuit grants an absolute immunity while the Eighth gives a qualified one. The Fifth and Tenth Circuits say, in per curiam opinions, that a public defender does not act under color of state law. And the Ninth Circuit says

the immunity of public defenders is absolute, therefore the question of color of state law need not be reached.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Des Moines, Iowa

Filed November 5, 1979

Before

Hon. HAROLD D. VIETOR, District Judge

Civil No. 79-507-B

RUSSELL RICHARD DODSON,

Plaintiff,

v.

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Defendants.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

RUSSELL RICHARD DODSON,	*	
Plaintiff,	*	CIVIL NO. 79-507-B
v.	*	
POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE AND MARTHA SHEPARD, individually and through her official capacity as an agent or assistant for Polk County,	*	ORDER OF DISMISSAL
Defendants.	*	

The Court has before it for initial review a pro se complaint submitted by Plaintiff, an inmate of the Iowa Men's Reformatory at Anamosa, Iowa. The complaint is brought under 42 U.S.C. §1983, and jurisdiction is predicated upon 28 U.S.C. §1343. Plaintiff has submitted an affidavit of indigence and a request for

leave to proceed in forma pauperis.

The events giving rise to this action arose out of plaintiff's conviction for robbery in the Iowa District Court. Following his conviction, defendant Martha Shepard, an attorney in the office of the Polk County Offender Advocate, was appointed to represent plaintiff on appeal. Subsequently, Ms. Shepard moved for permission to withdraw as counsel and to have the appeal dismissed as frivolous pursuant to Iowa R. App. P. 104.[1] The Iowa Supreme Court granted the motion and dismissed plaintiff's appeal.

Plaintiff contends that Ms. Shepard's actions deprived him of his right to counsel, inflicted on him cruel and unusual punishment, and arbitrarily denied him his state-created right to appeal in violation of the

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[1] Iowa Rule of Appellate Procedure 104 provides for dismissal of appeals found by the Supreme Court to be "wholly frivolous."

due process clause of the Fourteenth Amendment. In addition, plaintiff presents jurisdiction claims for malpractice and breach of oral contract. Plaintiff requests damages and release from confinement.

The claim for release from confinement is treated as a request for habeas corpus relief under 28 U.S.C. §2254. Preiser v. Rodriguez, 411 U.S. 475 (1973). Because plaintiff has not exhausted his state remedies by seeking post-conviction relief under Iowa Code Chapter 663A, as required by 28 U.S.C. §2254(b) and (c), the Court will not now take cognizance of his claim for release.

Relief under 42 U.S.C. §1983 is available only if the action of the defendant or defendants was "under color of" state law. This requirement is an essential

jurisdictional predicate. Robinson v. Bergstrom, 579 F.2d 401, 404 (7th Cir. 1978).

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." United States v. Classic, 313 U.S. 299, 326 (1941). This definition has repeatedly been reaffirmed. Monroe v. Pape, 365 U.S. 167, 183-87 (1961); Williams v. United States, 341 U.S. 97, 99 (1951); Screws v. United States, 325 U.S. 91, 108-113 (1945).

Many federal courts, including the United States Court of Appeals for the Eighth Circuit, have held that a privately practicing lawyer appointed by the court to represent an indigent defendant in a criminal case does not act "under color of"

state law in representing the defendant. United States ex rel. Simmons v. Zibilich, 542 F.2d 259, 261 (5th Cir. 1976); Harkins v. Eldredge, 505 F.2d 802, 803 (8th Cir. 1974); Barnes v. Dorsey, 480 F.2d 1057, 1060-61 (8th Cir. 1973); O'Brien v. Colbath, 465 F.2d 358 (5th Cir. 1972); Lefcourt v. Legal Aid Society, 445 F.2d 1150 (2d Cir. 1970); French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970); Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968). Indeed, no case to the contrary can be found.

The weight of authority holds that a lawyer in a public defender's office[2]

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[2] The Polk County Offender Advocate does not exist under the authority of Iowa Code Chapter 336A, which authorizes counties to establish the office of Public Defender. The Offender Advocate is the independent creation of the Polk County Board of Supervisors. It or one of its lawyers is appointed by the court to represent indigent defendants. It has a salaried lawyer director and several full time salaried lawyers. It is fully funded by Polk County. The Court takes judicial notice of the facts set forth in this footnote.

appointed by the court to represent an indigent defendant in a criminal case also does not act "under color of" state law in representing the defendant. Slavin v. Curry, 574 F.2d 1256, 1265 (5th Cir. 1978); Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972); Clark v. Brandom, 415 F. Supp. 883 (W.D. Mo. 1976); Berryman v. Shuster, 405 F. Supp. 1346 (W.D. Okla. 1975); United States ex rel. Wood v. Blacker, 335 F. Supp. 43 (D.N.J. 1971). Cf. Peake v. County of Philadelphia, 280 F. Supp. 853 (E.D. Pa. 1968). The only case found to the contrary is Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978). In Robinson the issue is thoroughly analyzed, and the Court reaches its result by concluding that the Public Defender was "an instrumentality of the state" and that defendant Bergstrom, a part-time Assistant Public Defender, "acted on

behalf of a state instrumentality" in representing plaintiff as his court-appointed counsel in a criminal case. Id. at 407-08.

I respectfully disagree with the Seventh Circuit's conclusion in Robinson that a lawyer in a public defender office acts on behalf of the public defender in representing a defendant in a criminal case. He acts only on behalf of his client, the defendant. His "professional duties and responsibilities toward his clients are identical in all respects to any other . . . attorney whether privately retained or court-appointed." Espinoza v. Rogers, supra, 470 F.2d at 1175.

The following language from Sanchez v. Murphy, 385 F. Supp. 1362 (D. Nev. 1974), a diversity legal malpractice case against a Public Defender and Deputy Public Defender

based on alleged malpractice of the Deputy, is instructive:

> The office of public defender is sui generis. Unlike other public offices, it is not established to serve the public generally. Such offices have been created in implementation of the obligations created by the Sixth and Fourteenth Amendments to the United States Constitution, to the end that every person charged with crime shall have an opportunity to be represented by counsel and to receive a fair trial. Recipients of the services of a public defender's office are only those indigents in whose aid a court or magistrate appoints a public defender to render legal advice and assistance. As noted, the relationship thus created is a strictly professional one. It is a personal relationship of trust and confidence governed by the canons of professional ethics under which the attorney owes an obligation of unswerving loyalty and devotion to the interests of his client.
>
> True, the Nevada statutes (fn.1) create only the office of public defender. True, the courts normally appoint "the public defender" to represent a defendant. The public defender appoints deputies and assigns a case to a

> deputy. If the nomenclature "deputy" is conclusive, the public defender is responsible for the deputy's malpractice. We think the name designation is not conclusive. The personal attorney-client relationship established between a deputy and a defendant is not one that the public defender can control. The canons of professional ethics require that the deputy be "his own man" irrespective of advice or pressures from others. A deputy public defender cannot in any realistic sense, in fullfillment of his professional responsibilities, be a servant of the public defender. He is, himself, an independent officer.

Id. at 1365.

In United States ex rel. Wood v. Blacker, supra, the court noted that the state's public defender act did not clothe public defender lawyers with a "power" that they did not already possess, and that public defender lawyers were empowered to represent criminal defendants by virtue of being licensed to practice law. The court added: "Moreover, though remunerated by the State

of New Jersey, these public defenders were neither servants nor representatives of the State, nor were they controlled by the State." 335 F. Supp. at 47. See Peake v. County of Philadelphia, supra, 280 F. Supp. at 854.

Establishing a public defender office is merely a means of administering the state's obligation to provide counsel to indigent defendants in criminal cases. Another means is appointment of privately practicing lawyers. The nature of the representation of an indigent defendant by a public defender is identical to the nature of the representation of an indigent defendant by a court-appointed privately practicing lawyer. In neither case is the power allegedly misused "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law," which is the classic

case definition of action taken "under color of" state law.

The actions of defendants Shepard and the Polk County Offender Advocate were not "under color of" state law, and therefore plaintiff has failed to state a claim against those defendants cognizable under 42 U.S.C. §1983.

Plaintiff has also failed to state a cognizable claim against Polk County and its Board of Supervisors. Assuming, but not deciding, that the Board of Supervisors is a "person" within the meaning of section 1983, plaintiff has not alleged the requisite personal involvement necessary to impose liability under this statute. See Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1972). Th doctrine of respondeat superior is not recognized in actions brought pursuant to 42 U.S.C. §1983. Monell v. New York City Dep't of Social Services, 436 U.S. 658, 691

(1978). The claim against Polk County is likewise based upon the theory of respondeat superior and therefore is not cognizable under section 1983. Local governments are liable under section 1983 only if the alleged constitutional deprivations occurred pursuant to the execution of its policies or custom. Id. at 694.

Because plaintiff's section 1983 claims are not cognizable, his pendent jurisdiction claims must also be dismissed. Kurz v. State of Michigan, 548 F.2d 172, 175 (6th Cir. 1977).

IT IS ORDERED that plaintiff's complaint be filed without prepayment of costs for the purpose of making a record.

IT IS FURTHER ORDERED that the above-entitled action be, and hereby is, dismissed as frivolous pursuant to 28 U.S.C. § 1915(d).

DATED this 2nd day of November, 1979.

HAROLD D. VIETOR
United States District Judge